No. 15041

United States Court of Appeals

For the Ninth Circuit

MA CHUCK MOON and MA CHUCK WOON, *Appellants*,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States, HERBERT BROWNELL, Attorney General of the United States, and JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellees*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Section 2201 Title 28 U.S.C.A., Section 1503 (a) Title 8 U.S.C.A., and the Administration Procedure Act, Sections 1009, 1011, Title 5 U.S.C.A., and upon this court by the provisions of Section 1291 Title 28 U.S.C.A.

PRELIMINARY STATEMENT

Appellants, together with one, Ma Chuck Wun, were admitted to the United States in possession of certificates of identity issued to them by the American Consulate at Hong Kong, British Crown Colony, China,

only after the District Court by order directed to the Secretary of State to do so, as the sons of an American Citizen, in September, 1952, for the purpose of prosecuting an action theretofore commenced for them by their father, Ma Tarn Sun, as their next friend, under the provisions of Section 503 of the Immigration and Naturalization Act of 1940, Section 903 Title 8 U.S.C.A., since repealed.

A trial was had in that proceeding two years later in 1954. Under a pretrial order in that case, on January 7, 1954, the issues were confined to the identity of appellants and Ma Chuck Wun as the blood sons of Ma Tarn Sun, their father, an American citizen, and as to whether fraud had been practiced by plaintiffs in claiming to be United States Nationals (R. 50).

During the trial of that action evidence was offered and admitted to show that at Hong Kong, China, the appellants herein, gave to the American Consul written statements under oath to the effect that Ma Chuck Wun was not their blood brother. Appellants at the trial denied having made such written statements under oath, but later recanted.

Blood grouping tests of all three, Ma Chuck Moon, Ma Chuck Woon, and Ma Chuck Wun, with that of Ma Tarn Sun, were made but proved inconclusive without the blood of Wong Shee, which it was not possible to procure because Wong Shee was then in China behind the bamboo curtain. The trial of that case was concluded in April, 1954. The court in that case made a finding of fact as to Ma Chuck Wun as follows:

"From a consideration of all of the evidence, the

Court is not satisfied that plaintiff Ma Chuck Wun is the blood son of Ma Tarn Sun." (R. 54)

No such findings was made in that case concerning Ma Chuck Moon and Ma Chuck Woon.

The court did, however, make this finding:

"The Court further finds that the plaintiffs, Ma Chuck Moon and Ma Chuck Woon, having perjured themselves, are not entitled to have much credence given their testimony in this case, and cannot believe that Ma Tarn Sun was not fully cognizant at all times of this perjury by Ma Chuck Moon and Ma Chuck Woon, and can therefore place little credence on his testimony, and further the court finds that Exhibit A-19 is not entitled to any probative value."

As conclusions of law in that case:

"The evidence is insufficient to grant the relief prayed for and the action should be dismissed and defendant be entitled to judgment with costs." (R. 54)

The judgment entered was:

"Ordered, Adjudged and Decreed that plaintiffs' action herein be and the same is hereby dismissed." (R. 54)

Criminal informations were filed against Ma Chuck Moon and Ma Chuck Woon arising out of the perjury committed, to which appellants entered pleas of guilty and were sentenced to McNeil Island Penitentiary for terms of three and a half and two and a half years respectively, with time off for good behavior, which they served and have since been released.

While confined in the penitentiary, John P. Boyd, District Director of Immigration and Naturalization,

issued warrants of arrest, which were served on appellants May 12, 1955, and on November 21, 1955, under File No. A 8897118. The District Director, in writing, notified appellants to appear before him Monday, December 19, 1955, at 1:00 p.m., for a hearing to enable them to show cause why they should not be deported from the United States as aliens. In that notice it was stated:

> "You are charged with being an alien illegally in the United States and subject to deportation upon the following grounds:
>
> "Section 241(a) (4) of the Immigration and Nationality Act, in that, he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefor in a prison or corrective institution for a year or more, to-wit: Perjury." (R. 18)

This hearing has not yet been had, having been postponed by the Director pending final decision of the District Court in the instant case.

At the conclusion of the trial in the former case the court on April 30, 1955, made and entered findings of fact and conclusions of law, which are set out in the memorandum opinion in the instant case (R. 44), and did find on the first issue presented by the pretrial order to-wit: That *Ma Chuck Wun was not the blood son of Ma Tarn Sun,* but made no similar finding with respect to Ma Chuck Moon and Ma Chuck Woon, appellants herein. The District Court, however, did make findings to the effect that Ma Chuck Moon and Ma Chuck Woon had perjured themselves and that for that reason little credence could be given their testimony.

Of course on the issues of identity, neither Ma Chuck Moon nor Ma Chuck Woon could offer competent evidence establishing their own identity, but they were identified by Ma Tarn Sun, who was present in China when each was born and who did identify Ma Chuck Moon and Ma Chuck Woon as his blood sons. In its finding No. IV the court stated:

> "The Court further finds that there is no credible evidence touching the identity of any of the persons called Ma Chuck Moon, Ma Chuck Woon and Ma Chuck Wun or that the persons named as plaintiffs, to-wit: Ma Chuck Moon, Ma Chuck Woon and Ma Chuck Wun, are the identical persons named in Finding III hereof, whose birth dates are set forth in said Finding III, other than self-serving declarations and the Immigration file of Ma Tarn Sun." (R. 51)

Finding No. IX in that case reads:

> "From a consideration of all of the evidence, the Court is not satisfied that plaintiff Ma Chuck Wun is the blood son of Ma Tarn Sun." (R. 54)

STATEMENT OF THE CASE

The instant case was commenced in February, 1955, under Section 1503 (a) Title 8 U.S.C.A., *applicable only to persons within the United States* claiming American Nationality and a denial of those rights by the Secretary of State which was well within the one-year limitation fixed by Rule 60 (b), Federal Rules of Civil Procedure, in which a motion for relief from judgments may be filed and it would seem that under the original complaint herein filed by their father, Ma Tarn Sun, against Dean Acheson, John Foster Dulles,

as Secretary of State, having been substituted, may properly be considered as such a motion in the former case No. 2749, in the interest of justice, as appellants now have other witnesses as to identity not available in 1954.

However, thereafter, in May, 1955, John P. Boyd, as District Director of Immigration and Naturalization, issued and served warrants of arrest upon appellants while they were confined in McNeil Island Penitentiary serving sentences for perjury committed by them in that cause, *seeking to deport appellants as aliens.* An amended complaint was thereupon filed, pursuant to an order so authorizing, making the District Director a defendant and alleging as ground for declaratory relief against the Director of Immigration their claim to American Citizenship and the denial thereof by the Director of Immigration the issuance of warrants of arrest seeking deportation of appellants as aliens. This amended complaint was filed pursuant to order entered September 21, 1955 (R. 26).

On July 27, 1955, appellants filed a motion for summary judgment under Rule 56 (R. 13), attached to which is the affidavit of Ma Tarn Sun, in which he states he is an American Citizen and setting forth the dates of birth in China of his sons, Ma Chuck Moon and Ma Chuck Woon, the former on July 25, 1925, and the latter on September 12, 1933, and that he was present in China at each birth and remained in China for more than two years after the birth of both his sons Ma Chuck Moon and Ma Chuck Woon; that he returned to China again in 1947, where he visited his wife and these

two sons and on his return to the United States he made arrangements to have these two sons come to the United States by preparing an affidavit, which was subsequently filed with the American Consulate at Hong Kong, China, to obtain travel documents for his sons' travel to the United States; that appellants are the legitimate blood sons of himself and Wong Shee. He further stated in his affidavit, in support of appellants' motion to amend their complaint, that since appellants commenced their action for a declaratory judgment in February, 1955, the Immigration and Naturalization Director, John P. Boyd, caused to be served upon appellants warrants of arrest seeking their deportation; copies of said warrants are attached to his affidavit (R. 15).

No counter affidavit denying the sworn statement of Ma Tarn Sun has been served or filed by the United States Attorney and the *statements made in the affidavit of Ma Tarn Sun stand admitted.* They clearly and positively identify both Ma Chuck Moon and Ma Chuck Woon as his blood sons (R. 13-15).

The United States Attorney did, however, thereafter in August, 1955, file a motion for summary judgment, supported by the affidavit of F. N. Cushman, Assistant United States, stating he had personally examined the record in Cause No. 2749 and interposed the defense of *res judicata* (R. 22). Thereafter and on October 24, 1955, by order entered herein, Herbert Brownell, Jr., as Attorney General, was made an additional defendant, he being the head of the Department of Justice,

which includes the Immigration and Naturalization Service (R. 42-3).

On December 31, 1955, the court filed his memorandum opinion (R. 44) and thereafter Findings of Fact, Conclusions of Law and judgment were entered on January 27, 1956 (R. 62) after a prior hearing in which recent cases from this court and from the Supreme Court of the United States were cited to the court in supplemental memoranda, but the court stated *he did not care to hear further oral argument.* The court requested appellants' counsel to prepare and file Findings and Conclusions in accordance with appellants' theory of the case, which was done.

While the memorandum opinion filed by the trial court December 31, 1955, refers to the warrants of arrest for deportation of appellants, no mention whatever is made thereof in the Findings made and entered by the trial court, the decision of the District Court being that appellants may not maintain this action because the former action is *res judicata.* The District Court relied principally upon what we believe to be a misinterpretation of the holding in the case of *Acheson v. Furusho,* 212 F.2d 284, from this court, where the question of the applicability of Rule 25 (d) of the Federal Rules of Civil Procedure relating to the substitution of parties as officers of the United States within six months after a vacancy in office has occurred, which substitution was authorized by this court. The District Court entirely overlooked the real decision in that case, which was, as we interpret it, that Rule 25 (d) of the Federal Rules of Civil Procedure does not apply to the

cases of this nature, as substitution may be and was authorized by this court.

We contend that by the same process of reasoning by this court in the *Furusho* case, Rule 41 (b) of Federal Rules of Civil Procedure upon which the District Court so strongly relied to support its application of the doctrine of *res judicata,* is inapplicable to actions of this kind.

Notice of appeal to this court was filed February 7, 1956, and cost bond on appeal with cash deposit in the amount of $250 was filed and lodged with the Clerk of the District Court the same day (R. 69-70).

The statute authorizing this proceeding under the Declaratory Judgment Act, is Section 1503 (a) Title 8, effective December 24, 1952, which reads:

> "If any person who is within the United States claims a right or privilege as a National of the United States is denied such right * * * by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department * * * for a judgment declaring him to be a national of the United States * * *."

The appellants were, when they commenced this action, and still are *persons who are within the United States claiming rights and privileges as Nationals of the United States* which have been denied them by the Director of Immigration and who come within the purview of this section. The claim to Nationality is contained in the amended complaint (R. 27) and in the af-

fidavits of Will G. Beardslee (R. 9) and Ma Tarn Sun (R. 13), neither of which in this proceeding anywhere is denied.

APPELLANTS' POINTS ON APPEAL

1. The District Court erred in granting defendants' motion for summary judgment of dismissal.
2. The District Court erred in denying plaintiffs' motion for summary judgment.
3. The District Court erred in dismissing plaintiffs' complaint on the ground of *res judicata.*

ARGUMENT

The statutes involved are Section 1503 (a) and 1251 (a) (4) Title 8 U.S.C.A. and Title 5, Secs. 1009, 1010 U.S.C.A.

Sec. 1503 (a) Title 8, reads:

> "If any person who is within the United States claims a right or privilege as a National of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. * * * "

The question in this case is as to whether nationals of

the United States who, while in the United States, invoke the provisions of Section 1503 (a) Title 8 U.S.C.A. under the declaratory judgment act may be prevented from establishing in a judicial proceeding their claim to American Nationality under the doctrine of *res judicata* because of a former judgment of dismissal for insufficiency of the evidence in an action instituted in their behalf while they were still in China, by their father, an acknowledged citizen, residing in the United States as their next friend under the provisions of former Section 903, Title 8 U.S.C.A., since repealed.

This case, it must be remembered, under the amended complaint, is not only against the Secretary of State, who was defendant in the former action, but also against the Attorney General of the United States and the District Director of Immigration and Naturalization, who seek to deport appellants as aliens for the sole reason that they were convicted of perjury arising out of their testimony in the former case and were committed to the penitentiary for more than a year, under the provisions of Sec. 241(a)(4) of the Immigration Act of 1940.

The crime for which they were convicted and sentenced was committed after the effective date of the Act of 1952.

The present Act is contained in Sec. 1251 (a) (4) Title 8 U.S.C.A.

In a recent case from the Court of Appeals for the District of Columbia, *Tom We Shung v. Brownell,* 227 F.2d 40, 41, involving exclusion the court there said:

"The present question, whether review may be

had on a complaint filed after the 1952 Act took effect, *is not res judicata, since it neither was or could have been decided in the previous suit, filed before the Act took effect.*" (Emphasis ours)

The court there, in a footnote, said:

"In this respect we disagree with *Heikkila v. Barber,* 9 Cir. 216 F.2d 497, certiorari denied 349 U.S. 927, 75 S.Ct. 769."

In reversing the cases of *Wa Kay Suey, Wong Poo Sing,* and *Emily Wong,* all against Brownell, Attorney General, 227 F.2d 41, 42, the court there said:

"In December, 1952, the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C.A. Sec. 1101 *et seq.* had become effective. Section 403 (a) (42) 66 Stat. 280, repeals the Nationality Act of 1940. Section 360 (a) of the Act of 1952 provides in effect that if any person 'who is within the United States' claims a right as a National of the United States, and the right is denied upon ground that he is not a national, he may institute an action for a declaratory judgment, 'except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceedings' 66 Stat. 273, 8 U.S.C.A. Sec. 1503 (a).

"The question is whether the 1952 Act deprived the plaintiffs of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgments. *We think not.*"

The United States Supreme Court in the case of

Shaughnessy, as District Director of Immigration and Naturalization v. Pedreiro, decided April 25, 1955, 75 S.Ct. 591, in dealing with a deportation order, said (p. 593, 75 S.Ct.):

"Relief was sought only against the District Director of Immigration and Naturalization for the District of New York. The District Court dismissed the petition on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party and should have been joined. This holding made it unnessary for the District Court to pass upon another ground urged for dismissal, that the Immigration and National Act of 1952 precluded judicial review of deportation orders by any method except habeas corpus.

"The Court of Appeals reversed, rejecting both contentions of the Government (2 Cir.) 213 F.2d 768. In doing so it followed the court of appeals for the District of Columbia Circuit which had held that deportation orders entered under the 1952 Immigration Act can be judicially reviewed in actions for declaratory relief under Sec. 10 of the Administrative Procedure Act, *Rubenstein v. Brownell,* 92 U.S. App. D.C. 328, 206 F.2d 449, affirmed by an equally divided court, 346 U.S. 929, 74 S.Ct. 319, 97 L.ed. 421. But the Court of Appeals for the First Circuit has held that habeas corpus is the only way such deportation orders can be attached. *Batista v. Nicolls,* 1 Cir. 213 F.2d 20. Because of this conflict among circuits and the contention that allowing judicial review of deportation orders other than by habeas corpus conflicts with *Heikkila v. Barber,* 345 U.S. 229, 73 S.Ct. 603, 97 L.ed. 972, we granted certiorari 348 U.S. 882, 75 S.Ct. 124.

> "The *Heikkila* case, unlike this one, dealt with a deportation order under the Immigration Act of 1917. The Act provided that deportation orders of the Attorney General should be final, and had long been interpreted as precluding any type of judicial review except by habeas corpus."

After discussing the *Heikkila* case, and pointing out the proper application of the word "final," and that the *Heikkila* case was not controlling in the *Shaughnessey* case, said:

> "The court carefully pointed out, however, that it did not consider whether the same result should be reached under the 1952 Immigration and Naturalization Act which took effect after *Heikkila* does not control this case and we must consider the effect of the 1952 Immigration and Naturalization Act on the right to judicial review under the Administrative Procedure Act."

Concluding at p. 594 of 75 S.Ct. the court said:

> "Our holding is that there is a right of judicial review of deportation orders other than by habeas corpus and that the remedy sought here is an appropriate one."

The court rejected the Government's contention that the Commissioner of Immigration and Naturalization is an indispensable party to an action for relief of this kind.

Section 1251 (a) (4) Title 8 (the 1952 Act, which was in effect when the former case was tried in 1954 and when the perjury was committed, reads:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who * * *

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more * * *."

The district court, in its memorandum decision (R. 55) in applying the doctrine of *res judicata,* said:

"In cause No. 2749 plaintiffs proceeded under Section 503 of the Nationality Act of 1940, 54 Statutes at Large, 1171, 8 U.S.C.A. Sec. 903 now repealed. Here plaintiffs are proceeding under the Act of June 27, 1952, c 477, Title III, Ch. 3 Sec. 360, 66 Stats. 273, being 8 U.S.C.A. Sec. 1503. So far as the issue here involved is concerned there is no material difference between former Section 903 and present Section 1503 * * *.

"In other words the same rights of plaintiffs were claimed to have been violated in the earlier action Cause No. 2749 by subordinates of the State Department whereas in the present action the rights are claimed to have been violated by subordinates of the Attorney General Department." (R. 55-56)

This latter conclusion is hardly a correct statement.

In the present action appellants claim the right to remain in the United States because they are nationals and citizens of the United States, although born in China of a father who is a recognized citizen of the United States and a mother who is a citizen of China, while the District Director seeks to deport them as aliens. In the former case instituted by their father, as next friend, at a time when appellants were still in China, the father, Ma Tarn Sun, brought an action in their behalf for a judicial determination of their status

as American Nationals, which after trial was dismissed for alleged lack of sufficient evidence.

The District Court in that former case made a definite finding with respect to one of the plaintiffs in that case, to-wit: Ma Chuck Wun, but not as to the appellants here (see Findings V and IX as to Ma Chuck Wun, set out in the memorandum decision) (R. 44-51-54).

For its conclusion on the doctrine of *res judicata* the District Court relied largely on the case of *Acheson v. Furushu,* 212 F.2d 284, and Rule 41 (b) Federal Rules of Civil Procedure, and in connection with that case said:

> "Under the reasoning of the court, applying it to the matter before us, any judgment that would have been found for the plaintiffs in the original action *would in reality be a judgment against the people of the United States* through a nominal defendant fixing the status of the plaintiffs." (R. 59)

The *Furusho* case dealt with the question of abatement and the court said at p. 290:

> "*In the first place the government may not be sued without its consent,* and it has been and still is a governmental policy to grant consent sparingly. *To enact a law making every suit against the head of a governmental department one virtually against the department over which he presides, would be widening the consent greatly.*
>
> "Besides, it might well result in the direction of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured.

"Nevertheless, Congress tried it, as we have heretofore mentioned, by enacting the Act of February 8, 1899, 30 Stat. 822." (Emphasis supplied)

and at p. 292:

"*In no case is there any hint of or expressed reason for extending the abatement doctrine to actions wherein the judgment merely adjudicates the nationality status of the plaintiff* by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment while the adjudication of the plaintiff as a national of the United States under Sec. 903 of Title 8 U.S.C.A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction.

"On the other hand, it is greatly to the interest of every official of the government and of every citizen of the country that, where questioned, the nationality of a person should meet with prompt settlement."

At p. 295:

"We repeat: That because the intent of the Congress and of the Supreme Court in statutes and rules relating to abatement was and is to remedy the situation revealed in Boutwell, and that no reason is apparent for either the Congress or the Supreme Court to intend otherwise and *because the reason for the statutes and court rules does not reasonably apply to Sec. 903 but is inconsistent with the situation found in Sec. 903 cases, neither the statutes nor the rules should be applied to proceedings under that section.* And we hold this opin-

> ion even if it would seem to appear from the face of the statute or rule that officer parties in Sec. 903 are not excepted."

The same may be said of Rule 41 (b) Federal Rules of Civil Procedure when applied to so important a matter as American citizenship.

A very recent decision by this court *Suda v. Dulles,* decided July 14, 1955, reported in 224 F.2d 908, 909, Chief Judge Denman quoted with approval language used by the Supreme Court in *Schneiderman v. Dulles,* 320 U.S. 118, 122, relating to citizenship, as follows:

> "In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty, for it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men."

Again, this court in *Chin Chuck Ming v. Dulles* (decided September 6, 1955) 225 F.2d 849, 851, Chief Judge Denman quotes with approval the statement of the United States Supreme Court in *Kwock Jan Fat v. White,* 253 U.S. 454, 464, 40 S.Ct. 566, 570, 64 L.ed. 1010, as follows:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen should be permanently excluded from his country."

In *Mah Ying Og v. McGrath* (C.A.D.C., 1950) 187 F.2d 199, it appears that an action under 903 Title 8 U.S.C.A. was dismissed on the ground of *res judicata.* The court there said (p. 200, 3rd par., second column):

> "The record presents the anomaly of two conflicting judgments on the same point by different judges of the same court."

It appears from that case that on May 30, 1940, appellant applied for admission into the United States on the ground that he was a son of a Native of the United States and therefore a citizen. His application was denied by a Board of Special Inquiry August 8, 1940, and by the Board of Immigration Appeals, November 27, 1940. He then sought relief by petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District, Southern Division of California. His petition was denied and on appeal that denial was affirmed by this Court, January 9, 1942, *Ma Ying Og v. Wixon,* 124 F.2d 1015.

The case holds, however, that in a proceeding under 903, now 1503 T. 8 U.S.C.A. that appellant was entitled to a trial *de novo.*

It is stated by the court at page 201, 3rd paragraph, right hand column:

> "The act as interpreted by the courts provides for a judicial declaration of the United States 'Nationality' or 'Citizenship' of persons claiming rights based upon such nationality or citizenship. * * * This avenue for judicial determination of his citizenship is open to relator here."

In *Ma Ying Og v. McGrath,* 187 F.2d 199, May Ying Og brought action under the Nationality Act of 1940, 503, 8 U.S.C.A. 903, against Howard McGrath, Attorney General of the United States, for a declaratory judgment that plaintiff is a citizen of the United States. A judgment dismissing the complaint was entered by

the United States District Court for the District of Columbia, and the plaintiff appealed. The Court of Appeals, Wilkin District Judge, held that the provision of the Immigration Act making the decision of a Board of Special Inquiry in exclusion of an alien final did not apply to action brought under Nationality Act to declare plaintiff a citizen where plaintiff was born in China of a parent claimed to be a native born American. Judgment reversed and remanded. 217 F.2d 142.

This court has held in *Southern Pac. R. Co. v. United States,* 133 F.2d 651, that a judgment of dismissal without prejudice is no bar to a subsequent suit on the same cause of action (affirmed 200 U.S. 34).

A decision in a prior case involving the same questions and subject matter and substantially the same parties, is not technically *res judicata* where the dismissal is without prejudice.

Krauthoff v. Kansas City, 31 Fed. 75, cert. den. 280 U.S. 583;

Port of Seattle v. Fid. & Dep. Co., 106 F.2d 277 (281).

The Immigration and Naturalization Service has recognized the father of these appellants, Ma Tarn Sun, as an American citizen and has also recognized Ma Chuck Moon and Ma Chuck Woon as the blood sons of Ma Tarn Sun and Wong Shee (R. 13).

In the case of *Fusae Yamamoto v. Dulles* (D.C., Hawaii, 1954) 16 F.R.D. 195, it was held (at page 198) that Section 1503 (a) of Title 8 did not change the statutory remedy of the declaratory judgment actions for persons within the United States and the parties plain-

tiff therefore could have filed individual actions after December 24, 1952, which was the effective date of Section 1503 (a) at page 199 the court said:

> "Movants' rights have not been taken from them but they must use the new procedure in order to establish their claims that they are nationals of the United States."

See also *Lew Thun a/k/a Lee Yee Ching,* 16 F.R.D. 352, and *Acheson v. Furusho* (9th Cir., 1954) 212 F.2d 284.

It would seem too plain for argument, that so precious a right as American Citizenship can be denied under the doctrine of *res judicata* merely because the court in its findings, applied the incorrect rule on the *quantum* of proof. Any fraud that may have been attempted to be practiced by the father of the plaintiffs in an attempt to bring in another Chinese minor should not be visited upon these appellants.

In the case of *Espino v. Wixon* (9 Cir.) 136 F.2d 96, where a Mexican person residing in the United States and who had resided therein for several years asserted his citizenship in deportation proceeding and the evidence received therein would, if believed, support a finding that he was a native born citizen, the entry of an order denying writ of habeas corpus without a judicial trial on the issue of citizenship was error (8 U.S.C.A. 180).

The court said (p. 97):

> "That a judicial trial of the issue of citizenship is necessary seems clear from the facts and the authorities. The act of deportation of a person from this country is authorized and enforced through an

executive proceeding. Appellant, like the applicants for a writ of habeas corpus in the case of *Ng Fung Ho v. White,* 259 U.S. 276, 282, 42 S.Ct. 492, 66 L.ed. 938, did not merely assert his citizenship of the United States and was not in the position of a person stopped at the border when seeking to enter this country. He was already in the United States and has resided therein for years, and he supported his claim to citizenship by evidence sufficient, if believed, to entitle him to a finding of citizenship." In the cited case the following question was posed:

" 'Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of his claim?'

"The court suggests other points not necessary at this time to be noted and says (page 284 of 259 U.S. p. 495 of 42 S.Ct. 66 L.ed. 938): 'Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus denial of an essential jurisdictional fact. * * * If the jurisdiction of the Department of Labor (then in charge of immigration proceedings) may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously *deportation* of a *resident* may follow upon purely executive order, whatever his race or place of birth; for where there is jurisdiction, a finding of fact by the executive department is conclusive, *United States v. Ju Toy,* 198 U.S. 253, 25 S.Ct. 644, 49 L.ed. 1040; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. United States,* 208 U.S. 8, 28 S.Ct. 201, 52 L.ed. 369, or the

finding was not supported by evidence, *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 23 S.Ct. 33, 47 L.ed. 90. * * * *To deport one who so claims to be a citizen, obviously deprives him of liberty as was pointed out in Chin Yow v. United States,* 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.ed. 369. * * * Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States v. Woo Jan,* 245 U.S. 552, 556, 38 S.Ct. 207, 62 L.ed. 90, 93, 40 S.Ct. 449, 64 L.ed. 797."

In *Furusho, supra,* after discussing the question of abatement the court (p. 290) said:

"In the first place, the government may not be sued without its consent, and it has been and still is a governmental policy to grant consent sparingly. To enact a law making every suit against the head of governmental department one virtually against the department over which he presides, would be widening the consent greatly.

"Besides, it might well result in the direction of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured. Nevertheless, Congress tried it as we have heretofore mentioned, by enacting the Act of February 8, 1899, 30 Stat. 822."

and at p. 292:

"In no case is there any hint of or expressed reason for extending the abatement doctrine to actions wherein the judgment merely adjudicates the nationality status of the plaintiff by the way, is as

binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment, while the adjudication of the plaintiff as a national of the United States under Sec. 903 of Title 8 U.S.C.A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction. On the other hand, it is greatly to the interest of every official of the government and of every citizen of the country that, where questioned, the nationality of a person should meet with prompt settlement."

At p. 295:

"We repeat: That because the intent of the Congress and of the Supreme Court in statutes and rules relating to abatement was and is to remedy the situation revealed in Boutwell, and that no reason is apparent for either the Congress or the Supreme Court to intend otherwise, and because the reason for the statutes and court rules does not reasonably apply to Sec. 903 but is inconsistent with the situation found in Sec. 903 cases, neither the statutes nor the rules should be applied to proceedings under that section. And we hold this opinion even if it would seem to appear from the face of the statute or rule that officer-parties in Sec. 903 are not excepted."

The same may be said of Rule 41(b).

The basic ground upon which the district court bottomed its decision in this case was the doctrine of *res judicata.*

That doctrine is applicable, as we understand it, only

where the parties are the same and similar relief is sought. The first suit was brought by Ma Tarn Sun, appellants' father, as next friend, in 1951 while appellants were still in China under a statute authorizing that procedure, but was not tried for nearly two years after appellant's arrival at Seattle, through no fault of appellants.

The district court, in its memorandum decision, hereinafter referred to quotes its finding No. II, in Cause No. 2749, as follows:

> "That as the result of a pretrial conference held the 7th day of January, 1954, the issues were confined to the question of identity of the plaintiffs as being the blood sons of Ma Tarn Sun and Wong Shee, and as to whether there was fraud practiced by plaintiffs in claiming to be United States Nationals." (R. 50)

A trial of that action was commenced in January, 1954, at which Ma Chuck Moon and Ma Chuck Woon each denied they had, under oath while being examined by a United States Vice Consul, executed and signed written statements to the effect that Ma Chuck Wun was not their blood brother; a continuance was requested by the United States Attorney to enable defendant to bring the Vice Consul before whom these statements were made, to testify in the case concerning that matter.

Upon the arrival of the Vice Consul in April, 1954, the trial was resumed. The appellants herein each took the stand and admitted that they, and each of them, had in fact written and signed these affidavits in which they stated that Ma Chuck Wun was not their blood

brother. The Vice Consul identified Ma Chuck Moon and Ma Chuck Woon as the persons who appeared before him in Hong Kong and under oath, swore to the truth of the statements contained therein and that he personally took their acknowledgements.

The present action was brought under the Nationality Act of 1952 (Sec. 1503 (a) Title 8 U.S.C.A., *applicable only to persons in the United States,* while the former action was instituted under former Section 903 Title 8 U.S.C.A., since repealed, applicable only to persons in a foreign country claiming American Nationality and Citizenship.

By their amended complaint in this case the appellants allege that they have, while lawfully in the United States, been denied rights and privileges of American Citizens by the Director of Immigration and Naturalization in that they have been *arrested as aliens* for deportation for the crime of perjury. The Director of Immigration has postponed hearing from time to time awaiting the district court decision in this case. The district court has made findings of fact, conclusions of law and entered a judgment dismissing their amended complaint on the sole ground of *res judicata,* holding, in effect, that appellants' action is one against the United States.

The United States has not consented to be sued in such cases.

We have found no case which has held the doctrine of *res judicata* applicable to citizenship cases. On the contrary, in the case of *Tom We Shung v. Brownell,* 22[illegible] F.2d 40, 41, we find this expression:

> "The present question, whether review may be had on a complaint filed after the 1952 Act took effect *is not res judicata,* since it neither was or could have been decided in the previous suit filed before the Act took effect."

So it is here. The District Director of Immigration is by the issuance of warrants of arrest of appellants seeking to deport appellants as aliens and, with the district court's permission, has been made a defendant herein (R. 26).

The Director of Immigration has chosen to defer a hearing on his warrants of deportation, pending the final determination of this action. It is alleged in the amended complaint that the Immigration Service has for thirty years recognized the father of appellants as an American Citizen, which is nowhere denied (R.13). In fact in the pretrial order such admission was made in the former case (R. 50, Finding II).

It is therefore respectfully submitted that the judgment of dismissal should be reversed and under the showing made, appellants adjudged by this Court to be Nationals of the United States of America.

Respectfully submitted,

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